93-858

NO._____

Supreme Court, U.S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

STATE OF SOUTH CAROLINA,
Petitioner

versus

ROGER D. GRIFFIN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

IS THE 1986 STATUTORY AMENDMENT TO THE SOUTH CAROLINA CODE, WHICH INCREASES THE TIME BETWEEN PAROLE RECONSIDERATION HEARINGS FROM ONE YEAR TO TWO YEARS FOR OFFENDERS CONVICTED OF VIOLENT CRIME, A CHANGE VIOLATIVE OF THE EX POST FACTO CLAUSES?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINIONS DELIVERED IN THE CASE BY OTHER COURTS . . .	iv
STATEMENT OF THE GROUNDS ON WHICh THE JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED	1
CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED IN THE CASE . .	3
STATEMENT OF THE CASE	5
ARGUMENT FOR ALLOWANCE OF THE WRIT . .	10
CONCLUSION	21
APPENDIX	23

TABLE OF AUTHORITIES

Cases	Page
Akins v. Snow, 922 F.2d 1558 (11th Cir. 1991)	16
Beazell v. Ohio, 269 U.S. 167, 171 (1925)	13, 14
Calder v. Bull, 3 Dall. 386 (1798	14
Collins v. Youngblood, 497 U.S. 37, 110 S.Ct 2715, 2719 (1990)	13, 15
Dobbert v. Florida, 432 U.S. 282, 293 (1977)	13
Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979)	18
Hopt v. Utah, 110 U.S. 574, 590 (1884)	13
Malloy v. South Carolina, 237 U.S. 180, 183 (1915)	15
Miller v. Florida, 482 U.S. 423 (1987)	13
Portley v. Grossman, 444 U.S. 1311, 1312 (1980)	13
Roller v. Cavanaugh, 984 F.2d 120 (4th Cir. 1993)	5
U.S. v. Munsingwear, Inc., 340 U.S. 36 (1950)	21

OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

Final Decree of the South Carolina Supreme Court denying the State's Petition for Rehearing, dated August 17, 1993.

Opinion of the South Carolina Supreme Court (No. 23909) affirming the PCR court's order granting Griffin's application for post-conviction relief, filed July 19, 1993.

Opinion of the Sixteenth Judicial Circuit of South Carolina dated April 0, 1992.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

Pursuant to the requirements set forth in Supreme Court Rule 14.1(e), Petitioner, the State of South Carolina, shows the following:

(i) The date of entry of the judgment of the South Carolina Supreme court for which the Petitioner seeks review is July 19, 1993. It affirms the Post-Conviction Relief court's order granting Respondent's application for relief.

(ii) The date of the South Carolina Supreme court's order denying Petitioner's petition for a rehearing of the case is August 17, 1993.

(iii) Not applicable.

(iv) Jurisdiction is conferred on the United States Supreme Court by virtue of 28 U.S.C. §1257(a). This statute allows this Court to review, upon petition for

writ of certiorari, final judgments rendered by the highest court of a state in which a decision could be had, where the validity of a state statute is being drawn in question on the ground of its being repugnant to the Constitution. In this matter, South Carolina Code §§16-1-60 and 24-21-645, are being drawn in question on the ground that their application to Respondent Griffin violates the Ex Post Facto Clauses.

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED IN THE CASE

U.S. Const. art. I, §9, cl. 3:

> No. . .ex post facto law shall be passed.

U.S. Const. art. I, §10, cl. 1:

> No state shall. . . pass any . . . ex post facto law. . . .

S.C. Code Ann. §16-1-60 (1986):

> For purposes of definition under South Carolina law a violent crime includes. . . voluntary manslaughter. . .

S.C. Code Ann. §24-21-610 (1981), see Appendix F.

S.C. Code Ann. §24-21-620 (1981), see Appendix G.

S.C. Code Ann. §24-21-645 (1986):

> [U]pon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole.

S.C. Code Ann. §24-21-650 (1986):

> [U]pon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole.

Sections 8, 266, and 269 of South Carolina Act No. 184 of 1993, see Appendix K.

STATEMENT OF THE CASE

This case raises the same ex post facto question as was presented in Roller v. Cavanaugh, 984 F.2d 120 (4th Cir. 1993), cert granted May 25, 1993, No. 92-1510, and argued before this Court on November 8, 1993. The question there, as here, asks this: Is the 1986 statutory amendment to the South Carolina Code, which increases the time between parole reconsideration hearings from one to two years for offenders convicted of a violent crime, a violation of the constitutional prohibition against ex post facto laws? In South Carolina parole is not a matter of right, but a matter of the discretion of the State Board of Probation, Parole and Pardon Services.

In this case, the Respondent, Griffin, was indicted for murder in April 1984. On May 21, 1984, Griffin appeared before the court of general sessions and entered a plea of guilty to voluntary manslaughter. After

making a thorough inquiry into the voluntariness of Griffin's plea, the court accepted it and sentenced Griffin to thirty years. Griffin did not appeal his guilty plea or sentence.

On July 1, 1991, Griffin filed an application for Post-Conviction Relief (PCR), pursuant to S.C. Code Ann. §17-27-10 et seq. In his application, Griffin alleged, among other things, that the State had, in violation of the Ex Post Facto Clauses, applied to him the 1986 law that increased the period between parole hearings from one to two years. The PCR judge found that Griffin relied upon the then-existing annual parole review when he decided to plead guilty, and that the application of the challenged statute to him violated the constitutional prohibition against ex post facto laws. The State then appealed to the South Carolina Supreme Court from the order

granting Griffin's application for post-conviction relief.

On appeal, the South Carolina Supreme Court ruled in Griffin's favor on the ex post facto questions. The Court's decision was based on the Fourth Circuit's holding in Roller v. Cavanaugh, supra, and overruled its own well-established precedent, State v. Gunter, 298 S.C. 113, 378 S.E.2d 443 (1989). The court did not take notice of the fact that the State's petition for a writ of certiorari in the Roller case had been granted. The South Carolina Supreme Court appears to have overlooked the fact that the last word on Roller has yet to be spoken. On this basis, the State petitioned for a re-hearing of the matter. This petition, however, was summarily denied on August 17, 1993. From that final decision of the South Carolina Supreme Court, the State now petitions for a writ of certiorari to have the case reviewed.

A word more on the facts of this case is necessary to set them properly in the context of the ex post facto question presented here. When Griffin committed his crime, the state procedural law governing the rescheduling of parole hearings following a rejection fixed the waiting period at one year. S.C. Code Ann. §24-21-645. In 1986, S.C. Code Ann. §16-1-60 was enacted. This section enumerated those crimes deemed to be violent and included in that enumeration the crime of voluntary manslaughter, the crime to which Griffin pled guilty. In 1986 §24-21-645 was amended increasing the period before Griffin could be again reconsidered for parole from one year to two years. The two-year wait for parole reconsideration following a rejection was thus applied to Griffin. That, however, was all that changed Griffin's circumstances in any manner. The punishment for voluntary manslaughter remained exactly what it had been

when Griffin committed that crime. On January 1, 1994, two changes in the law concerning parole go into effect. These changes are the result of the passage of S.C. Act No. 184 of 1993. Section 8 of Act No. 184 amends S.C. Code Ann. § 5-1-60 by creating a subsection (B). It specifies that for a person to be considered guilty of a violent crime, the offense must be defined as a violent crime pursuant to subsection (A) at the time of the commission of the crime.

Section 266 of Act 184 specifies that "[t]he provisions of subsection 16-1-60(B) apply retroactively to all persons convicted under the laws of the State." (Emphasis added).

ARGUMENT FOR ALLOWANCE OF THE WRIT

THE 1986 STATUTORY AMENDMENT TO THE SOUTH CAROLINA CODE, WHICH INCREASES THE TIME BETWEEN PAROLE RECONSIDERATION HEARINGS FROM ONE YEAR TO TWO YEARS FOR OFFENDERS CONVICTED OF VIOLENT CRIME, DOES NOT VIOLATE THE EX POST FACTO CLAUSES.

The ex post facto question is not as simple as the lower court has made it out to be. Relying entirely and, we think, wrongly, on the Fourth Circuit's decision in Roller v. Cavanaugh, 984 F.2d 120 (1993), the Supreme Court of South Carolina wrongly equates parole eligibility in South Carolina with parole reconsideration. Once this equation is made, it is but a short step to the conclusion that the statutory change in question violates the ex post facto prohibition. It is a short step because the equation, albeit an erroneous one, puts the question squarely under the well-established

rule that parole eligibility is a substantive matter and attaches to the punishment. Change parole eligibility retroactively and to the prisoner's disadvantage, and the prohibition against ex post facto laws is implicated.

However, the point is wholly irrelevant to the question here. In South Carolina, a prisoner becomes eligible for parole on his sentence only once and remains eligible thereafter absent some intervening occurrence not relevant to this case. Thereafter, violent offenders are considered for parole every two years. Griffin's date of eligibility for parole has not changed; that date was fixed from the start. See S.C. Code Ann. §24-21-610. What has changed is the procedure governing the interval between parole hearings after a rejection. For Griffin that interval used to be one year; now it is two years. This is all that has been changed. No punishment has been added

to Griffin's original sentence after the fact. His sentence has not been lengthened. His parole eligibility has not been revoked or altered in any way. No "gain time" credits have been lost retroactively. As the Supreme Court of South Carolina correctly found in Gunter v. State, 298 S.C. 113, 378 S.E.2d 443 (1989), "the standards governing petitioner's parole eligibility have not been changed. Instead, only the frequency with which petitioner can be reconsidered for parole has been altered." The only change in Griffin's situation is just this and nothing more -- a procedural change determining how frequently he will be reconsidered for parole. Gunter, though correctly decided, was overruled by the court in the decision Petitioner is seeking here to have reviewed, Griffin v. State, Op. No. 23909.

Though this change lengthens the period for reconsideration after denial of parole,

it does not offend the Ex Post Facto Clauses. Not all retroactive changes offend, a point well-established in the precedent of this Court:

> [T]he prohibition of ex post facto laws does not extend to every change of law that "may work to the disadvantage of a defendant." It is intended to secure "substantial personal rights" from retroactive deprivation and does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance."

Portley v. Grossman, 444 U.S. 1311, 1312 (1980), quoting Dobbert v. Florida, 432 U.S. 282, 293 (1977). See also, Miller v. Florida, 482 U.S. 423 (1987); Beazell v. Ohio, 269 U.S. 167, 171 (1925); Hopt v. Utah, 110 U.S. 574, 590 (1884).

This Court reminds us in Collins v. Youngblood, 497 U.S. 37, 110 S.Ct 2715 (1990), that we must go back to the beginnings of ex post facto analysis, to clear the books of much of the confusion that has arisen in recent years. In Beazell v. Ohio,

269 U.S. 167 (1925), this Court confidently summarized the general rule of ex post facto analysis, which had its beginning in Calder v. Bull, 3 Dall. 386 (1798):

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto [citations omitted].

Collins, which goes back to Calder via Beazell, reminds us of the Court's own original understanding of the Ex Post Facto Clause. That original understanding rejects the notion -- now increasingly current in some circuits, and among them, the Fourth Circuit, -- that any change which alters the situation of a party to his disadvantage violates the Ex Post Facto Clauses. Collins

emphasizes, in both its majority and concurring opinions, that "the Ex Post Facto Clause 'was intended to secure substantial personal rights against arbitrary and oppressive legislation.'" 497 U.S. at ___, 110 S.Ct. at 2721, quoting Mallo, v. South Carolina, 237 U.S. 180, 183 (1915). See also 497 U.S. at ___, 110 S.Ct. at 2727. Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition "cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree." Collins, 497 U.S. at ___, 110 S.Ct. at 2727, quoting Beazell.

The South Carolina Supreme Court's reasoning leaves no room for case-by-case analysis of ex post facto problems. The state court's analysis reduces all levels of factual complexity to the lowest common denominator of simplicity: all changes in the law which operate retroactively to the

disadvantage of the convicted criminal, no matter how slight, violate the prohibition against ex post facto laws. The lower court has created a simplistic "bright line" rule for analysis of complex constitutional issues. This is the inescapable implication of the court's reasoning when it refuses to recognize the distinction between the facts presented here and the facts presented in Akins v. Snow, 922 F.2d 1558 (11th Cir. 1991), a case upon which the court, in its reliance on the Fourth Circuit's decision in Roller, seems to place great weight.

This case is distinct from Akins, and the distinction is based on an important matter of substance and degree, one which this Court should recognize under Collins v. Youngblood. As a matter of law and fact, the situation presented in Akins is vastly different from the situation here. In Akins, the interval between parole reconsideration hearings after a denial was in-

creased from one year to eight years. This was even longer than it took to become eligible for parole in the first instance, which was seven years in Akins' case. The Eleventh Circuit equated the period between parole hearings with parole e igibility itself. It did so on the basis of its finding that the Georgia legislature "considers a parole reconsideration hearing an essential and important part of parole eligibility." 922 F.2d at 1562. (At this point, it is important to emphasize, once again, that in South Carolina parole eligibility and parole reconsideration are statutorily two different things, separate and distinct.) It was thus easy for the Akins court to conclude that the change increased the punishment retroactively and therefore violated the prohibition against ex post facto laws.

South Carolina has more freedom than Georgia to experiment with changes in parole

reconsideration, because South Carolina's parole laws do not make parole reconsideration an integral or essential part of parole eligibility, as do Georgia's parole laws. South Carolina should not lose its legitimate freedom to experiment with its parole system in the way that it has distinguished between parole reconsideration hearings for violent and non-violent offenders. South Carolina will lose a large part of that legitimate freedom to experiment if it is not given the chance to challenge the Fourth Circuit's opinion. This Court has well recognized that the several states should be encouraged to develop their own parole systems and be allowed to experiment with ways of improving those parole systems. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979). The Fourth Circuit's approach to ex post facto analysis, as evinced here, undermines this Court's wise concern for the right of

every state to fashion its own parole system, leaving to each state as much freedom as possible under the federal constitution. Important issues of federalism are implicated by reading the Ex Post Facto Clauses to shackle the State to the past and prevent it from making changes necessary to meet new challenges. The Court should grant South Carolina's petition and examine the lower court's ex post facto analysis in this case. We think that the Court will find that on this question the lower court is indeed very far out of line with the pronouncements of this Court. Even if Griffin were successful in having yearly parole reconsideration hearings, any real benefit to him is speculative. Merely granting hearings more frequently is no assurance that Griffin will be released from confinement any earlier than he would otherwise have been released. Indeed this Court is powerless to redress Griffin's true grievance which is his con-

finement. Issues of standing exist which this Court should examine in this factual context.

Before concluding, a brief word on mootness. Though counsel for the State during the oral argument before this Court on Roller represented that the effect of these changes may be to require yearly parole reconsideration hearings for those, like Respondent Griffin, convicted of violent crimes, no official interpretation of these provisions has been promulgated or applied, nor, of course, has any court, trial or appellate, reviewed or decided on Respondent's entitlement to yearly parole reconsideration hearings. In light of uncertainty as to the effect of these recent amendments, and the fact that they are voluntary amendments of the State legislature, amendments that they are free to rescind or change again, this case is not thereby rendered moot. However, should this

Court rule that the instant case is moot, this Court's reasoning in U.S. v. Munsingwear, Inc., 340 U.S. 36 (1950) urges vacation of the lower court opinion.

CONCLUSION

If allowed to stand, the lower court's opinion will force South Carolina to restructure the entire process for scheduling and hearing parole reconsiderations on all of its most serious, violent offenders who are in a position similar to that of Roger D. Griffin.

The lower court's opinion has another bad effect. It discourages states from engaging in fair and wise experimentation with their parole procedures for fear of violating the Ex Post Facto Clauses. South Carolina has had its parole rescheduling procedure in place since 1986, and it has worked well over the years proving itself to be fair and efficient. Non-violent offenders, because they are less dangerous and may

have shorter sentences, come up for parole reconsideration every year; violent offenders, because they are more dangerous and usually have longer sentences, are reconsidered every two years. This is a process based on good sense, fairness, and wide experience with both success and failure.

South Carolina asks to be heard.

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Counsel of Record

CARL W. STENT
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SERVICES

BY: James Patrick Hudson

ATTORNEYS FOR PETITIONER

APPENDIX

Opinion of the South Carolina Supreme Court (No. 23909) affirming the PCR court's order granting Griffin's application for post-conviction relief, filed July 19, 1993 . . . . . App. A

Opinion of the Sixteenth Judicial Circuit of South Carolina dated April 20, 1992 . . . . . App. B

Final Decree of the South Carolina Supreme Court denying the State's Petition for Rehearing, dated August 17, 1993 . . . . . App. C

Opinion of the Fourth Circuit Court of Appeals in Roller v. Cavanaugh, 984 F.2d 120 (1993), cert. granted May 25, 1993 . . App. D

Opinion of the South Carolina Supreme Court in Gunter v. State, 298 S.C. 113, 378 S.E.2d 443 (1989), filed March 6, 1989 . App. E

Parole eligibility statute in 1982. Codified as S.C. Code Ann. §24-21-610 (1981) . . . . . App. F

Parole rescheduling statute in 1982. Codified as S.C. Code Ann. §24-21-620 (1981) . . . . . App. G

Parole rescheduling statute in 1986. Codified as S.C. Code Ann. §24-21-645 (1986) . . . . . App. H

Parole rescheduling statute in 1986. Codified as S.C. Code Ann. §24-21-650 (1986) . . . . . App. I

Violent crime classification statute in 1986. Codified as S.C. Code Ann. §16-1-60 (1986) . . App. J

Violent crime classification statute in 1993, effective 1994. Sections 8, 266, and 269 of South Carolina Act No. 184 of 1993. Codified in part as S.C. Code Ann. §16-1-60 (1993) . . . . . App. K

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Roger D. Griffin, Respondent,

v.

State of South Carolina, Petitioner.

Appeal From York County
John C. Hayes, III, Judge

Opinion No. 23909
Submitted April 20, 1993 -
Filed July 19, 1993

AFFIRMED

Attorney General T. Travis Medlock, Chief Deputy Attorney General Joseph D. Shine and Assistant Attorneys General Delbert H. Singleton, Jr. and Lisa Godwin Jefferson, all of Columbia, for Petitioner.

Assistant Appellate Defender Robert M. Pachak, of SC Office of Appellate Defense, of Columbia, for Respondent.

TOAL, A.J.: The State appeals from an order granting Respondent's application for post-conviction relief. We AFFIRM.

Facts

The Respondent, Griffin, was indicted for murder in April 1984. On May 21, 1984, Griffin appeared before the court and entered a plea of guilty to voluntary manslaughter. Prior to the acceptance of the plea, the trial judge conducted a lengthy colloquy to determine the voluntariness of the plea. At the conclusion of the judge's questioning, the plea was accepted and Griffin was sentenced to thirty years imprisonment. Griffin did not appeal his guilty plea or sentence.

On July 1, 1991, Griffin filed an Application for Post-Conviction Relief. In his application, Griffin alleged, inter alia, that the State's application of the Omnibus Crime Bill, specifically the change

from an annual review for parole eligibility to a biannual review, violated the ex post facto clause of the South Carolina and United States Constitutions. The PCR judge found that Griffin relied upon the annual review for parole eligibility in his decision to plead guilty, and that Griffin's constitutional rights under the ex post facto clause were violated. We granted the State's petition for certiorari to review the PCR court's order.

Law/Analysis

The State raises two issues on appeal. The first and pivotal issue is whether the PCR judge erred in ruling that Griffin suffered a violation of the ex post facto clause. The second issue is whether the PCR judge erred in finding that Griffin's plea of guilty to voluntary manslaughter was not knowingly, voluntarily, and intelligently entered.

We addressed this first issue in Gunter v. State, 298 S.C. 113, 378 S.E.2d 443 (1989). In Gunter, the applicant for post-conviction relief raised an ex post facto challenge to the change in parole eligibility review. Id. After examining the question, we held that:

> the standards governing petitioner's parole eligibility have not . . . changed. Instead, only the frequency with which petitioner can be reconsidered for parole has been altered. We find no ex post facto violation in the application of the questioned statute to petitioner.

Id. at 115-16, 378 S.E.2d at 444.

The PCR court distinguished Gunter on the grounds that Griffin had pled guilty and that Gunter was convicted at trial. This is not completely correct. While it is true Gunter was tried, convicted, and sentenced to thirty years for voluntary manslaughter, we reversed the conviction in State v. Gunter, 286 S.C. 556, 335 S.E.2d 445 (1985). On remand, Gunter pled guilty to voluntary

manslaughter and received a thirteen-year sentence. Our PCR holding in Gunter v. State, 298 S.C. 113, 378 S.E.2d 443 (1989), was rendered while Gunter was serving the thirteen year sentence as a result of his plea of guilty.

Since Gunter, we have held that "[t]he ex post facto clause protects against retroactive legislative provisions which are disadvantageous to the offender. A mere procedural change in law, not increasing punishment or changing elements of the offense, does not result in an ex post facto violation." Elmore v. State, 305 s.C. 456, 459, 409 S.E.2d 397, 399 (1991); see also Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987).

Respondent cites the recent Fourth Circuit decision in Roller v. Cavanaugh, 984 F.2d 120 (1993). In Roller, the Fourth Circuit Court of Appeals disregarded our decision in Gunter, and held that the statu-

tory amendment for review of parole eligibility was a violation of the ex post facto clause. The Fourth Circuit relied on Akins v. Snow, 922 F.2d 1558 (11th Cir. 1991), which found an ex post facto violation in a Georgia statute that decreased the frequency of parole hearings from once a year to once every eight years. Obviously the Georgia statute was an example of how a procedural change could be expanded to have a substantive effect.

The Fourth Circuit's analysis is compelling. It is difficult to determine where the difference lies between a review once every two years and once every eight years. This gray area tortures the ex post facto analysis between a change in the standards for review and a procedural change in timing. The Akins court was faced with a statute that provided for a procedural change which effectively changed the standards for parole. We must now acknowledge

that where a procedural rule is so overly intrusive that it substantively effects the review standard, it then becomes an ex post facto violation. In adopting the Fourth Circuit's holding in Roller, we overrule our holding in Gunter, 298 S.C. 113, 78 S.E.2d 443 (1989).

In light of our holding today, we need not reach the second issue. Accordingly, for the reasons stated, the decision of the PCR court is AFFIRMED.

HARWELL, C.J., CHANDLER, FINNEY AND MOORE, JJ., concur.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF
COUNTY OF YORK	)	COMMON PLEAS
Roger D. Griffin, 122723,	)	
	)	
Applicant,	)	
	)	
-vs-	)	ORDER
	)	
State of South Carolina,	)	
	)	
Respondent,	)	

This is a post conviction matter. The Applicant is presently confined in the Perry Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court for York County. The Applicant was indicted at the April, 1984, term of York County General Sessions Court and charged with murder. He was represented by Wade Weatherford, Esquire. On May 21, 1984, Applicant plead guilty to voluntary manslaughter, and was sentenced by the Honorable Robert L. McFadden to a thirty year sentence. Appli-

cant did not appeal his guilty plea or sentence.

Applicant has filed for post-conviction relief by his application dated June 20, 1991. The State has made a Return dated October 4, 1991. A hearing on these pleadings was held before me on November 22, 1991. At this hearing, Applicant was represented by Charles B. Burnette III of the York County Bar. The Respondent was represented by Lisa Jefferson, Esquire, of the Office of the Attorney General.

At the hearing, Applicant testified that he was advised by his trial attorney, Mr. Weatherford, that he would be eligible for parole on an annual basis. Trial attorney, Mr. Weatherford, also testified at the hearing. He testified that he did advise Applicant that he would be eligible for parole every year. Applicant testified that he relied, as part of the plea bargaining in this case, on the representation that he would be considered annually for parole

after eligibility. Mr. Weatherford testified, relevant to this, that it was important to Applicant that he would be eligible for parole eligibility on an annual basis in considering whether to plead guilty.

In Gunter v. State, 298 S.C. 113, 378 S.E. 2d 443 (1989), the South Carolina Supreme Court ruled that the ex post facto clauses of the United States and South Carolina Constitutions were not violated where only the frequency with which the inmate can be considered for parole has been altered. However, it would appear that Jimmy Lee Gunter was convicted and did not plead guilty to the offense.

Here, the undisputed evidence is the Applicant was told by his attorney that he would be considered for parole annually, and that he relied upon this representation in deciding whether to plead guilty. Furthermore, counsel advised the Applicant that he would be so considered, and that the Appli-

cant relied upon this advise in reaching his decision to plead guilty.

Notwithstanding the distinguishing facts in the present case compared to the facts in Gunter, I find that there is substantial federal authority that th frequency of parole consideration is, both in law and in practice, an important component of a prisoner's parole eligibility. A change in its frequency is a substantial one that effectively disadvantages an inmate. See Watson v. Estelle, 859 F.2d 105 (9th Cir. 1988), Aikens v. Snow, 922 F.2d 1558 (11th Cir. 1991), Fender v. Thompson, 883 F.2d 303 (1989) and Schwartz v. Muncey, 834 F.2d 396 (4th Cir. 1987).

Defendant deciding to plead guilty must have a full understanding of what the plea connotes and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed 2d 274 (1969). Our Supreme Court has held that when a trial judge

misinforms a defendant that he is eligible for parole when in fact he is ineligible for parole, his plea does not represent "a voluntary and intelligent choice among alternative courses of action" available to him, citing, State of North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed 2d 162 (1970). Brown v. State, _____ S.C. _____, 412 S.E.2d 399 (1991). Unlike the situation in Gunter, then, the Court does not confront a situation where the law on parole eligibility was simply changed after a prisoner was convicted upon a plea of not guilty. Rather, on the facts here, the annual parole eligibility extant at the time of the plea formed an integral part of the applicant's decision to plead guilty, as his attorney testified.

Under these circumstances, the Court is constrained to find that Applicant relied upon the law in existence at the time in deciding to plead guilty. It would not be

fair under the peculiar fact in this record to permit the statutory change to apply to him. Therefore, it is ordered that the Parole Board consider him for parole every year; or in the alternative, that Applicant be allowed to withdraw his plea. C.F. Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed 2d 427 (1971), (Where guilty plea is induced by prosecutorial promises, those promises must be fulfilled.)

IT IS SO ORDERED.

s/
JOHN C. HAYES, III, JUDGE
Sixteenth Judicial Circuit

York, South Carolina
April 20, 1992.

(SEAL)

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR. — CLERK
BRENDA F. SHEALY — DEPUTY CLERK
P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

August 17, 1993

The Honorable T. Travis Medlock
The Honorable Joseph D. Shine
The Honorable Delbert H. Singleton, Jr.
Office of the Attorney General
P.O. BOX 11549
Columbia, S.C. 29211

Re: Roger D. Griffin v. State of South Carolina

Gentlemen:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing denied.

s/David W. Harwell C.J.

s/A. Lee Chandler A.J.

s/Ernest A. Finney, Jr. A.J.

s/Jean H. Toal A.J.

s/James E. Moore A.J.

August 17, 1993."

The remittitur in this matter is today being forwarded to the Clerk of Court for York County.

Very truly yours,

/s/ Brenda F. Shealy

DEPUTY CLERK

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-6688

Gary Lee Roller,
Plaintiff-Appellant

v.

Michael J. Cavanaugh, Executive Director of the South Carolina Department of Probation, Parole, and Pardon Services; South Carolina Department of Probation, Parole, and Pardon Services,
Defendants-Appellees

Appeal from the United States District Court for the District of South Carolina, at Columbia; Henry Michael Herlong, Jr., District Judge

(CA-90-3054-3-20-J)

Argued: December 3, 1992

Decided: January 15, 1993

Before RUSSELL and HALL, Circuit Judges, and MORGAN, United States District Judge for the Eastern District of Virginia, sitting by designation.

Reversed and remanded by published opinion. Judge Hall wrote the opinion, in which Judge Russell and Judge Morgan joined.

COUNSEL

ARGUED: W. Gaston Fairey, FAIREY & PARISE, P.A., Columbia, South Carolina, for Appellant. Carl Norman Lundberg, Chief Legal Counsel, SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES, Columbia, South Carolina, for Appellees. **ON BRIEF:** Edwin E. Evans, Chief Deputy Attorney General, Columbia, South Carolina, for Appellees.

OPINION

HALL, Circuit Judge:

Gary Lee Roller appeals an order of the district court granting summary judgment for the defendants in Roller's 42 U.S.C. §1983 suit challenging the frequency of his parole reconsideration hearings. We must decide whether a statutory amendment increasing the length of time between parole reconsiderations from every year to every two years is an unconstitutional ex post facto law if applied to prisoners whose crimes were

committed before the amendment. Concluding that it is, we reverse.

I.

In early 1983, Gary Roller was convicted of voluntary manslaughter and grand larceny in South Carolina state court. Both of these crimes occurred on December 13, 1982. On March 25, 1983, he was sentenced to consecutive terms of imprisonment of thirty and five years. At that time, a South Carolina statute provided that, within ninety days of the prisoner's becoming eligible for parole, the Parole Board would review the case and determine whether to grant parole. If the Board decided not to grant parole, "the prisoner's case shall be reviewed every twelve months thereafter for the purpose of such determination.' Former S.C. Code 24-21-620 (1976 & Supp. 1981). In 1986, this statute was amended to make reconsideration of parole for violent offenders less frequent -- every two years. S.C. Code §24-21-

645 (1989 & Supp.1991). The date at which a prisoner initially becomes eligible for parole, however, was not changed.

In 1990, Roller became eligible for parole. On October 31, 1990, the Board rejected parole, and advised Roller that his next hearing would be held October 31, 1992.[1]

On December 28, 1990, Roller filed this suit under 42 U.S.C. §1983 against the members of the Parole Board in their official and personal capacities. He sought monetary, declaratory, and injunctive relief. The gravamen of his claim was that application of the less-frequent parole review to him violated the federal constitution's prohibition of ex post facto laws.

The defendants moved for summary judgment. The magistrate recommended that the motion

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[1] We were advised at oral argument that this hearing was held, and parole was denied.

be granted. Over Roller's objections, the district court adopted the magistrate's recommendation.

Roller appeals.

II.

A.

The district court held that Roller's official-capacity claims for damages were not cognizable under §1983, see Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989), and that the defendants had not overstepped their qualified immunity[2] so as to subject themselves to personal liability. See Harlow v. Fitzgerald, 457 U.S. 800 (1982). On appeal, Roller does not challenge these rulings. Because, however, prospective relief to stop unconstitutional practices by

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[2] Because qualified immunity suffices to shield the defendants from personal liability, we need not decide whether the scheduling of parole reconsiderations is performance of a quasi-judicial function, for which the defendants would have absolute immunity. See generally, Forrester v. White, 484 U.S. 219, 225-229 (1988); Pope v. Chew, 521 F.2d 400, 405 (4th Cir. 1975).

states is available in federal courts, Ex parte Young, 209 U.S. 123 (1908), Roller's claims for declaratory and injunctive relief are not affected by the defendants' immunities. Pulliam v. Allen, 466 U.S. 522 (1984).

B.

In 1973, in the midst of an unprecedented influx of civil rights suits by prisoners, the Supreme Court held that

> when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.

Preiser v. Rodriguez, 411 U.S. 475, 509 (1973). The defendants here argue that Roller is attacking a part of his sentence -

- parole eligibility -- and §1983 does not provide relief. The Preiser distinction is important here because Roller has not exhausted his state remedies on his ex post facto claim -- a general prerequisite to federal habeas corpus relief, but not to a §1983 suit.

In Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978), we held that §1983 was the proper vehicle for a defendant who sought to preclude a state parole board from considering allegedly invalid prior convictions. Because the petitioner did not assert that he was entitled to parole, "now or ever," no exhaustion of the state habeas remedy was required. Like the inmate in Strader, Roller does not say he is entitled to parole. We follow Strader and find that Roller has stated a cognizable §1983 claim.

III.

A.

The Constitution prohibits both the federal and state legislatures from passing ex post facto laws. U.S. Const. art I, §9, cl. 3 and §10 cl. 1. Neither Congress nor the states may "enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then described.'" Weaver v. Graham, 450 U.S. 24, 28 (1981) (quoting Cummings v. Missouri, 4 Wall. 277, 325-26 (1867). Though there is no constitutional requirement that a state permit parole or early release from confinement, Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979), statutes providing for parole are "part of the law annexed to the crime at the time of the person's offense." Schwartz v. Muncy, 834 F.2d 396, 398 n.8 (4th Cir.

1987) (quoted in Fender v. Thompson, 883 F.2d 303, 305 (4th Cir. 1989).

The ex post facto clauses are a restriction on the power of government and operate without regard to the affirmative "rights" of the individual. Consequently, it is immaterial to an ex post facto challenge to computation of a release or parole eligibility date that the prisoner does not have a "vested" liberty or property right in parole, "good time," or the like. Weaver, 450 U.S. at 29-30 (criticizing state court for rejecting ex post facto claim by finding no "vested right" to good time credits).

The South Carolina Supreme Court has rejected a challenge identical to Roller's. Gunter v. State, 298 S.C. 113, 378 S.E.2d 443 (1989).

B.

Four of our sister courts of appeals have directly addressed whether a retroactive reduction in the frequency of parole consid-

eration violates the ex post facto clause. Three have held that it does, though the Ninth Circuit's opinion was vacated on other grounds and is thus a nullity. Rodriquez v. United States Parole Comm'n, 594 F.2d 170 (7th Cir. 1979) (parole recon-ideration changed from one-third point in sentence to every eighteen months; ex post facto clause violated as to a prisoner serving only a two-year sentence); Watson v. Estelle, 859 F.2d 105 (9th Cir. 1988), vacated, 886 F.2d 1093 (1989); Akins v. Snow, 922 F.2d 1558 (11th Cir.), cert. denied, 111 S.Ct. 2915 (1991); but see Bailey v. Gardebring, 940 F.2d 1150 (8th Cir. 1991), cert. denied, 112 S.Ct. 1516 (1992) (lead judge held that administrative rule was not a "law" subject to ex post facto clause; one judge concurred only in the result; the third dissented). In Akins, the Eleventh Circuit considered a Georgia statute that decreased the frequency of parole hearings from once a year to once

every eight years. The court held that this change affected the substantive rights of persons who committed crimes before its enactment, and was not simply a "procedural change." The court reasoned:

> Since the [parole board] is required to hold some type of parole reconsideration hearing **before** granting parole, an inmate is effectively **ineligible** for parole between two reconsideration hearings. Because an inmate is not paroled without a parole reconsideration hearing, the hearing must be considered an essential part of parole eligibility. 922 F.2d at 1562 (boldface in original).

The appellees cannot convincingly distinguish Akins. They concede that a seven-year increase in a prisoner's wait between reconsiderations is so long that it is substantive, but assert, "[a]s if you could kill

time without injuring eternity,"[3] that a one-year wait is procedural" and presents no ex post facto difficulty. See Dobbert v. Florida, 432 U.S. 282 (1977) (ex post facto clause does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance").[4]

We are not willing to disparage the "substance" of a year, especially a year in prison.

Defendants also point out that Roller becomes and remains "eligible" for parole just as he would have under the law in

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[3] Thoreau, Walden; or, Life in the Woods, "Economy," reprinted in Walden and Other Writings by Henry David Thoreau 111 (Bantam Classic ed. 1981).

[4] Cf. cases in which changes in the manner of reimposing sentence after the original sentence is set aside have been held to present no ex post facto problem. Collins v. Youngblood, 497 U.S. 37 (1990) (Texas statute allowing appellate court to reform illegal sentence); Evans v. Thompson,. 881 F.2d 117 (4th Cir. 1989), cert. denied, 110 S.Ct. 3255 (1990) (Virginia statute providing that capital defendants whose sentences are vacated may be resentenced before a new jury).

effect when he committed his crimes. The defendants do not, however, identify any benefit flowing from the status of "eligibility" other than the right to be heard and considered for parole. Eligibility without consideration is a cold comfort.

This circuit has no case so directly on point as Akins; however, two cases provide us considerable guidance. In Schwartz v. Muncy, 834 F.2d 396 (4th Cir. 1987), the court reviewed a Virginia statute that increased the time before an inmate would become eligible for parole on existing sentences if the inmate committed a third offense after the statute's effective date. The court held that the statute increased the punishment for a crime completed before its enactment, and thus the statute violated the ex post facto clause.

In Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989), a state inmate was serving a life sentence. Under the state law in

effect at the time of the crime, the inmate was eligible for parole after fifteen years. The state legislature later passed a law revoking the parole eligibility of inmates who escaped while serving life sentences. The inmate escaped after passage f the new law, and his eligibility for parole was revoked. We held that, though the state could punish escape in almost any manner it pleased, it could not do so by increasing the punishment for crimes committed before the new escape statute was enacted. We stated this general rule:

> [S]tatutes enacted or amended after a prisoner was sentenced cannot be applied to alter the conditions of or revoke his or her preexisting parole eligibility . . .

883 F.2d at 306. South Carolina has undoubtedly applied its new statute to "alter the conditions of . . . [Roller's] preexisting

parole eligibility." Indeed, it has effectively "revoked" eligibility for an extra year following a denial.

The judgment is reversed, and the case is remanded with instructions to grant declaratory, and, if necessary, injunctive,[5] relief in favor of Roller. Our decision does not, of course, require or even suggest that Roller be paroled. South Carolina need never parole him, so long as it considers the question every year.

REVERSED AND REMANDED

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[5] See Steffel v. Thompson, 415 U.S. 452, 468-471 (1974) (district court may anticipate that state authorities will comply with a declaratory judgment and thereby forego issuing an injunction).

THE STATE OF SOUTH CAROLINA

In the Supreme Court

Jimmy Lee Gunter, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal from Richland County

George B. Timmerman, Jr.,

Special Circuit Judge

Opinion No. 22981

Submitted January 31, 1989 -

Filed March 6, 1989

AFFIRMED

Assistant Appellate Defender Joseph L. Savitz, III, of S.C. Office of Appellate Defense, of Columbia, for petitioner.

Attorney General T. Travis Medlock, Chief Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Frank L. Valenta, Jr., all of Columbia, for respondent.

PER CURIAM: Petitioner was convicted of voluntary manslaughter and was sentenced to imprisonment for thirteen (13) years. He now seeks a writ of certiorari to review the denial of his application for post-conviction relief (PCR). We grant certiorari, dispense with further briefing, and affirm.

Petitioner alleges that the application of three statutes to him violates the ex post facto clauses of the United States and South Carolina Constitutions.[1] First, petitioner challenges S.C. Code Ann. §24-21-645 (Supp. 1987), which permits him to be reconsidered for parole only on a biannual basis. Under the statutory scheme in effect when

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[1] See U.S. Const. art. I, §10; S.C. Const. art. I, §4.

petitioner committed the crime, he was eligible for reconsideration for parole every twelve (12) months. See S.C. Code Ann. §24-21-620 (Supp. 1987). In 1986, §24-21-645 was amended to provide that persons convicted of violent crimes, defined in §16-1-60 to include voluntary manslaughter, will be reconsidered for parole every two years.

On this issue we find persuasive the holding of the California Supreme Court in In re Jackson, 39 Cal.3d 464, 703 P.2d 100, 216 Cal. Rptr. 760 (1985). There the Court held that a statutory amendment prolonging the time before reconsideration for parole was a procedural change outside the purview of the ex post facto clause. Cf. Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) (generally ex post facto clause does not apply to procedural changes). The Court reasoned that the amendment did not alter the criteria by which parole suitability is determined, but rather

changed only the frequency with which an inmate was given to demonstrate parole suitability.

By the same token, the standards governing petitioner's parole eligibility have not been changed. Instead, only the frequency with which petitioner can be reconsidered for parole has been altered. We find no ex post facto violation in the application of the questioned statute to petitioner.

Second, petitioner challenges S.C. Code Ann. §24-13-650 (Supp. 1987), which prohibits any person convicted of a violent offense from being released under the work release program in the community where the crime was committed. It must be noted initially that we have found nothing in the statutes indicating that petitioner had a pre-existing right to be considered for work release in the community where the offense was committed. Therefore, it seems doubtful

whether petitioner has made out a legitimate ex post facto claim.

Even assuming petitioner had previously been eligible for work release in the community where the offense was committed, we find no ex post facto violation in petitioner being denied this possibility under §24-13-650. The Board of Corrections has discretion whether to allow an inmate even to participate in a work release program. See S.C. Code Ann. §24-3-20 (1976). Therefore, participation in a work release program is a privilege, giving rise to no vested rights cognizable under the ex post facto doctrine. People v. Miller, 79 A.D.2d 687, 434 N.Y.S. 2d 36 (1980).

Further, in Morris v. Meacham, 718 P.2d 1354 (Okla. 1986), the Oklahoma Supreme Court upheld the retroactive application of a statutory amendment rendering the inmate ineligible for assignment to a work release program. The Court said that modes of

procedure, such as a security classification, do not affect matters of sufficient substance to invoke the prohibition against ex post facto laws. Cf. Mellinger v. Idaho Dep't of Corrections, 114 Idaho 494, 757 P.2d 1213 (Ct. App. 1988) (upholding implementation of stricter conditions of release).

In the present case, §24-13-650 does not deny petitioner consideration or even require him to face tougher criteria for the work release program. Rather, he is merely foreclosed from being released into the community in which he committed the crime. We find no ex post facto violation in applying this statute to petitioner.

Petitioner's remaining argument concerns supervised furloughs. As S.C. Code Ann. §24-13-710 (Supp. 1987) read at the time the offense was committed, petitioner was at least theoretically capable of satisfying the criteria for obtaining a furlough.

However, since that time the statute has been amended to include, among other things, requirements that the inmate be neither sentenced to more than five years nor convicted of a violent offense. Because petitioner received a sentence of thirteen (13) years for a violent offense, he is now foreclosed from being considered for a furlough.

In Milhouse v. Levi, 548 F.2d 357 (D.C. Cir. 1976), the court held that regulations adversely affecting an inmate's eligibility for furloughs are not subject to the constitutional prohibition against ex post facto laws. The Court distinguished furlough programs from parole, describing furlough programs as internal rehabilitation procedures that are not an integral part of the sentencing process.

We agree that the furlough program is not part of the sentencing process. As stated in Anders v. South Carolina Parole &

Community Corrections Bd., 279 S.C. 206, 305 S.E.2d 229 (1983), the purpose behind the enactment of §24-13-710 was to help alleviate prison overcrowding. The purpose was not to confer substantial rights upon certain members of the prison population. We therefore hold that the application of §24-13-710, as amended, to petitioner does not amount to an ex post facto violation.

For the foregoing reasons, the denial of post-conviction relief is AFFIRMED.

S/George T. Gregory, Jr.

S/David W. Harwell

S/A. Lee Chandler

S/Ernest A. Finney, Jr.

S/Jean Hoefer Toal

S.C. Code Ann. §24-21-610 enacted June 15, 1981 (parole eligibility)

"Section 24-21-610. In all cases cognizable under this chapter the Board may, upon ten days' written notice to the solicitor and judge who participated in the trial of any prisoner, parole such prisoner convicted of a felony and imprisoned in the state penitentiary, in any jail or upon the public works of any county:

(1) Who, if sentenced for not more than thirty years, shall have at least one third of the term;

(2) Who, if sentenced to life imprisonment or imprisonment for any period in excess of thirty years, shall have served at least ten years;

(3) Who, if he is a first offender and is sentenced for an indeterminate term shall have served the minimum for which he was sentenced.

Provided, if after January 1, 1984, the Board shall find that the statewide case classification system provided for in Chapter 23 of this title has been implemented, that an intensive supervision program for parolees who require more than average supervision has been implemented, that a system for the periodic review of all parole cases in order to assess the adequacy of supervisory controls and of parolee participation in rehabilitative programs has been implemented, and that a system of contracted rehabilitative services for parolees is being furnished by public and private agencies, then in all cases cognizable under this chapter the Board may, upon ten days' written notice to the solicitor and judge who participated in the trial of any prisoner, to the victim or victims, if any, of such felony, and to the sheriff of the county where the prisoner resides or will reside, parole such prisoner convicted of a

felony and imprisoned in the state penitentiary, in any jail or upon the public works of any county:

(1) Who, if sentenced for the crime of murder, armed robbery, criminal sexual assault, assault and battery with intent to kill or kidnapping, shall have served at least one third of the term; provided, that for any other crime the prisoner shall have served at least one fourth of the term;

(2) Who, if sentenced to life imprisonment or imprisonment for any period in excess of forty years, shall have served at least ten years;

(3) Who, if he is a first offender and is sentenced for an indeterminate term shall have served the minimum for which he was sentenced.

Provided, further, that the provisions of this section shall not affect the parole ineligibility provisions for murder and

armed robbery as set forth respectively in Section 16-3-20 and Section 16-11-330.

Provided, further, that in computing parole eligibility, no deduction of time shall be allowed in any case for good behavior, but that after June 30, 1991, there shall be deductions of time in all cases for earned work credits, notwithstanding the provisions of Section 16-3-20, Section 16-11-330 and Section 24-13-230.

Notwithstanding the provisions of this section, the Board may parole any prisoner not sooner than one year prior to the prescribed date of parole eligibility when, based on medical information furnished to it, the Board determines that the physical condition of the prisoner concerned is so serious that he would not be reasonably expected to live for more than one year. Notwithstanding any other provision of this section or of law, no prisoner who has served a total of ten consecutive years or

more in prison shall be paroled until the Board has first received a report as to his mental condition and his ability to adjust to life outside the prison from a duly qualified psychiatrist or psychologist."

S.C. Code Ann. §24-21-620 enacted June 15, 1981 (parole hearing rescheduling)

"Section 24-21-620. Within the ninety-day period preceding a prisoner having served one-fourth of his sentence, the Board, either acting in a three-member panel or meeting as a full Board, shall review the case, regardless of whether or not any application has been made therefor, for the purpose of determining whether or not such prisoner is entitled to any of the benefits provided for in this chapter; provided, that in cases of prisoners in confinement due to convictions for nonviolent crimes, an administrative hearing officer may be appointed by the Commissioner of Paroles and Pardons to review the case who shall submit to the full Board written findings of fact and recommendations, which shall be the basis for a determination by the Board. Upon an affirmative determination, the prisoner shall be granted a provisional parole. Upon a negative determination, the prisoner's

case shall be reviewed every twelve months thereafter for the purpose of such determination."

S.C. Code Ann. §24-21-645 enacted June 3, 1986 (parole hearing rescheduling)

"Section 24-21-645. The Board may issue an order authorizing the parole which must be signed either by a majority of its members or by all three members meeting as a parole panel on the case, ninety days prior to the effective date of the parole; provided that at least two-thirds of the members of the Board must authorize and sign orders authorizing parole for persons convicted of a violent crime as defined in Section 16-1-60. A provisional parole order shall include the terms and conditions, if any, to be met by the prisoner during the provisional period and terms and conditions, if any, to be met upon parole. Upon satisfactory completion of the provisional period, the Executive Director or one lawfully acting for him, shall issue an order, which, if accepted by the prisoner, shall provide for his release from custody.

Provided, that upon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole."

S.C. Code Ann. §24-21-650 enacted June 3, 1986 (parole hearing rescheduling)

"Section 24-21-650. The Board shall issue an order authorizing the parole which must be signed by at least a majority of its members, with terms and conditions, if any; provided, that at least two-thirds of the members of the Board must sign orders authorizing parole for persons convicted of a violent crime as defined in Section 16-1-60. Thereupon the supervisor of parole, or one lawfully acting for him, shall issue a parole order, which, if accepted by the prisoner, shall provide for his release from custody.

Provided, that upon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole."

S.C. Code Ann. §16-1-60 (1976) enacted June 3, 1986 (violent crime classification)

"Section 16-1-60. For purposes of definition under South Carolina law a violent crime includes the offenses of murder, criminal sexual conduct in the first and second degree, assault and battery with intent to kill, kidnapping, voluntary manslaughter, armed robbery, drug trafficking as defined in Section 44-53-370(e), arson in the first degree, burglary in the first degree, and burglary in the second degree under Section 16-11-312(B)."

Sections 8, 266, and 269 of South Carolina Act No. 184 of 1993 (violent crime classification)

SECTION 8. Section 16-1-60 of the 1976 Code is amended to read:

"Section 16-1-60. (A) For purposes of definition under South Carolina law a violent crime includes the offenses of murder (Section 16-3-10); criminal sexual conduct in the first and second degree (Sections 16-3-652 and 16-3-653); criminal sexual conduct with minors (Section 16-3-655); assault with intent to commit criminal sexual conduct (Section 16-3-656); assault and battery with intent to kill (Section 16-3-620); kidnapping (Section 16-3-910); voluntary manslaughter (Section 16-3-50); armed robbery (Section 16-11-330); drug trafficking as defined in Section 44-53-370(e); arson in the

first degree (Section 16-11-110 (A)); burglary in the first degree (Section 16-11-311); and burglary in the second degree (Section 16-11-312(B)).

(B) For a person to be considered guilty of a violent crime, t e offense must be defined as a violent crime pursuant to subsection (A) at the time of the commission of the crime."

SECTION 266. All proceedings pending and all rights and liabilities existing, acquired, or incurred at the time this act takes effect are saved. The provisions of this act other than Section 16-1-60(B) apply prospectively to crimes and offenses committed after the effective date of the act. The provisions of subsection 16-1-60(B) apply

retroactively to all persons convicted under the laws of this State. All sentences pronounced on or after the effective date of this act must comply with the classification system, except where a penalty greater than he one in effect on the date the offense was committed would be required.

SECTION 269. This act, other than Sections 267 and 268, takes effect January 1, 1994.

Approved the 21st day of June, 1993.